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COURT OF CRIMINAL APPEALS
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NO. PD-0812-17

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/27/2017
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JOSHUA GOLLIDAY

Appellant

VS.

THE STATE OF TEXAS

Respondent

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APPELLANT'S REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW

On Petition For Discretionary Review from the
Second Court of Appeals in No. 02-15-00416-CR
Reversing Conviction in Cause No. 1379815D
371st District Court, Tarrant County, Texas

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ATTORNEY FOR APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested and would be unnecessary to any determination whether this Court should exercise its discretionary jurisdiction to consider the published opinion of the Second Court of Appeals.

STATEMENT OF THE CASE

Appellant was convicted of sexual assault. Appellant's brother and the complainant were neighbors. (RR III 172-77). The jury recommended probation, which the trial court assessed.

A majority of the en banc court of appeals reversed Appellant's conviction based upon the trial court's exclusion of proffered cross-examination testimony of the complainant and the SANE nurse.

The State filed its Petition For Discretionary Review to which Appellant files this his reply.

REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW

The State is asking the Court of Criminal Appeals to grant PDR in a case where it claims error was not preserved, even though approximately 15 pages outside the jury's presence were needed to record the proffered cross-examination testimony of two witnesses, which the Court of Appeals majority correctly held the trial court improperly kept the jury from hearing, as this proffered testimony went to the heart of Appellant's ability to present a defense. The State argues that the trial court did not understand Appellant's complaint.

Said the majority: "Appellant did exactly what he was supposed to do. He told the trial court clearly what evidence he wanted the jury to hear, the prosecution objected, and the trial court sustained the objections, thereby holding that Appellant could not present his impeachment evidence before the jury. He therefore preserved his complaints about the exclusion of the evidence."

The majority reached this conclusion after noting that Evidence Rule 103(a)(2) is the subsection that discusses the exclusion of evidence: "a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Here, Appellant informed the trial court of the substance of the testimony for 15 pages; the substance was very apparent from the context. The trial court was clear in its ruling that all matters from the proffered cross-examination would be excluded.

The first authority cited in the dissent (authored by now former Chief Justice Livingston) is Tex. R. App. P. 33.1(a): "A party must make a timely request, objection, or motion in the trial court that states the grounds for the desired ruling with sufficient specificity to make the trial court aware of the complaint." But the quote in the dissent only included the first part of the rule, not the part following 'unless': "…unless the specific grounds were apparent from the context."

The "unless" language is very similar in both Evidence Rule 103(a)(2) and Appellate Rule 33.1(a).

The majority correctly notes that different rules apply for preservation of error when a party is attempting to admit evidence (as is the case here) as opposed to when a party is attempting to exclude evidence. The majority correctly observed that "When evidence is improperly excluded, no objection is required, but a proper offer of proof is required."

The majority was correct to distinguish *Vasquez v. State*, 483 S.W.3d 550 (Tex. Crim. App. 2016), as that case does address "preservation of error when evidence is improperly admitted," as opposed to when evidence is improperly excluded, as is the case here.

Looking at both rules, the proffered cross-examination testimony was offered in a timely fashion; the State's objections were sustained by the trial court. The grounds of the complaint were apparent from the context of the proffered testimony.

The jury heard Complainant say on direct (on eight pages of transcript) and on cross-examination (17 pages of transcript) that she could not recall or remember what happened many times.[1] She said that she heard screaming in her head. The excluded testimony went to her bias, motive, ability to recall and motive to testify in a particular fashion. [The majority detailed many of these instances, which are not more fully addressed in this reply due to space limitations.]

The actions of the trial court prevented Appellant from presenting a defense. The majority correctly cites *Carroll v. State*, 916 S.W.2d 494 (Tex. Crim. App. 1996). That opinion begins with a great discussion about the history of cross-examination, noting "the right of confrontation helps to establish a criminal justice system 'in which the perception as well as the reality of fairness prevails'…The right to confront one's accusers necessarily includes the right to cross-examine. As the Supreme Court held in *Davis v. Alaska*: The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination…" *Carroll* at 497 (citations omitted). "…cross-examination

[1] See III 42-61; 69-97.

allows the jury to assess the credibility of the witness…" Id. "The Constitutional right of confrontation is violated when appropriate cross-examination is limited." Id at 497-98. That is exactly what happened here. This was cross-examination. Cross-examination is the heart of the 6th Amendment to the U.S. Constitution. Any trial judge would know that a ruling against a defendant in these circumstances implicates the Constitution. No trial judge needs to be reminded that limiting cross-examination implicates the Constitution.

Carroll also noted that "The jury was entitled to the 'whole picture' in order to evaluate and judge the witness' credibility." Id at 499. It is disingenuous to argue that the trial court did not understand that the Constitution is implicated when cross-examination is limited.

This Court has said that the standards of procedural default "are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it…" This Court went on to state that the parties should not be required to "read some special script to make their wishes known." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). After quoting *Lankston*, this

Court later said: "Of critical importance is whether the trial court understood appellant's objection, including the legal basis for the objection. Where the record makes clear that the trial court understood an objection and its legal basis, a trial court's ruling on that objection will be preserved for appeal, despite an appellant's failure to clearly articulate the objection. *Cofield v. State*, 891 S.W.2d 952, 954 (Tex. Crim. App. 1994). Hence appellant was not necessarily compelled to state the magic words 'I object' to preserve error." *Taylor v. State,* 939 S.W.2d 148, 154-55 (Tex. Crim. App. 1996).

The majority was correct to cite *Bryant v. State,* 391 S.W.86, 92 (Tex. Crim. App. 2012): A "party need not spout magic words…to preserve an issue as long as the basis of his complaint is evident to the trial court."

To allow the lack of the use of the magic words to prevail would serve to undermine (in the words quoted in Carroll) the "perception as well as the reality [that] fairness prevails" in our criminal justice system.

When the specific basis for the objection can be determined from the context, a general objection may be enough to preserve error. The policy reason for requiring specific objections is to inform the trial judge of the basis of the objection and allow an opportunity to rule, and to allow opposing counsel an opportunity to remove the objection or supply other testimony. "Where the correct ground of exclusion was

obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection." *Zillender v. State*, 557 S.W. 515, 517 (Tex. Crim. App. 1977), citing 1 McCormick & Ray, Evidence, Sec. 25, p. 25 (2d ed 1956).

Here, this complaint is about evidence that was excluded.

If Appellant had not approached bench and developed a record, nothing is preserved. But where draw the line? Does a trial court need to hear the magic word Constitution on cross-examination to understand that the Constitution is implicated by the trial court's ruling limiting cross-examination? Should the rule in Texas be that the trial court must be reminded that cross-examination implicates the Constitution, or otherwise the trial court will not know that the trial court has limited the valuable constitutional right of confrontation by its ruling? Does this trump the right to present a defense, and for the public to have confidence that the criminal justice system does in fact produce justice? Should the focus be constitutional rights, or being sure the trial judge understands the obvious?

The purpose of the error preservation rules is to allow a trial court an opportunity to fix a complaint at trial. Here, Appellant took 15 pages developing what he wanted to present to the jury in his defense. The State objected. The trial court sustained the State's objections, thus limiting Appellant's Constitutional right to confront and cross examine the witnesses against him.

The majority correctly noted that in this case, neither the trial court nor the parties had the benefit of the opinion in *Johnson v. State*, 490 S.W.3d 895 (Tex. Crim. App. 2016). There, the Court noted that "In a case such as this, where the believability of the complainant forms the foundation of the State's case, Texas law favors admissibility of evidence that is relevant to the complainant's bias, motive or interest to testify in a particular fashion." The Court noted that "An accused is given wide latitude to show any fact 'which would tend to establish ill feeling, bias, or motive for fabrication on the part of any witness testifying against the accused." *Johnson* at 914. Here, Complainant stated many times (as noted above) that she did not remember parts of the events of the evening. Appellant sought to introduce evidence of why that is the case. The trial court did not let the jury hear any of the proffered testimony. This was evidence that, as the majority correctly held, was "constitutionally required to be admitted." The actions of the trial court prevented Appellant from presenting his defense to the jury.

Even though the prosecutor objected that the proffered cross-examination testimony of Complainant was not relevant, it followed directly with much of Complainant's testimony on direct: "I don't remember what I said. I just heard screaming in my head." She admitted on direct that she was intoxicated. She could not remember much of what happened. This proffered and excluded

cross-examination testimony dove-tailed exactly with the direct. The trial court erred in sustaining the prosecution objection.

Here, Appellant's counsel specifically told the trial court that this evidence was offered so the jury could get the "whole picture."

Carroll also noted that the *Davis* Court "held that the defendant's right of confrontation was paramount." *Carroll* at 501.

The majority quoted (in bold) from *Hammer v. State*, 296 S.W.2d 555, 563 (Tex. Crim. App. 2009): "[T]he constitution is offended if the state evidentiary rule would prohibit him from cross-examining a witness concerning possible motives, bias, and prejudice to such an extent that he could not present a vital defensive theory." The majority then noted that the rulings of the trial court "did not allow jurors to fairly and fully evaluate the complainant's credibility," thus preventing Appellant from fully presenting his vital defensive theory.

These words from *Hammer* (also quoted by the majority) are extremely appropriate here: The "Texas Rules of Evidence, especially Rule 403, should be used sparingly to **exclude** relevant, otherwise admissible evidence that **might** bear upon the credibility of either the defendant or complainant in such 'he said, she said' cases. And Texas law, as well as the federal constitution, requires great latitude when evidence deals with a witness's specific bias, motive or interest to testify in a

particular fashion." [emphasis added.] Here, it was the prosecutor who objected and sought to exclude relevant evidence that would bear on the credibility of Complainant who, by her own admission was intoxicated and could not remember much of the events of this "he said she said" situation. This clearly went to her bias, motive and interest to testify in a particular fashion. Public policy should, as *Hammer* notes, favor inclusion here, so that the public can have confidence in the criminal justice system, and that it is fair to all.

And as the Court noted in *Virts v. State*, 739 S.W.2d 25 (Tex. Crim. App. 1987): "it is still necessary to point out, for emphasis purposes, that the right of cross-examination by the accused of a testifying State's witness includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting the witness's credibility."

Everyone in the courtroom knew that the proffers were on cross-examination. This portion of the record is labeled cross-examination. When the prosecutor objected to the proffered cross-examination testimony, the prosecutor was attempting to limit cross-examination. When the trial court sustained the prosecutor's objections, the trial court limited Appellant's cross-examination. Any

limitation of cross-examination does by definition limit the right to cross-examination and implicates the Sixth Amendment.

Should the policy of this State be that when the State objects to relevant evidence offered on cross-examination by a defendant that unless the trial court is reminded that this is occurring on cross-examination, the conviction should be upheld on appeal?[2]

Counsel for Appellant argued (in the words of *Carroll*), that the jury should see the "whole picture" of Complainant, who testified that she did not remember the events, that she was intoxicated, and that she just heard screaming in her head. Thus at the earliest opportunity on cross-examination, Appellant brought to the attention of the trial court exactly what was being requested. This was done with sufficient specificity to make the trial court aware of the complaint. This proffered testimony did not confuse the trial judge.

This evidence was proffered to test the credibility of Complainant before the jury; this is a clear reference to the Confrontation Clause. Cross-examination is "a

[2] As the majority stated, the trial court erred when it excluded proffered cross-examination testimony of Complainant as well as proffered cross-examination testimony of the SANE about Complainant. The majority did not address the complaints in the defense case when Appellant proffered testimony from witnesses about Appellant's good character, and the trial court again sustained the State's objections. The majority also did not address Appellant's complaints about the cumulative effect of all of these trial court rulings.

tool used to flesh out the truth…" C.J Rehnquist concurring in *Crawford v. Washington.* See 541 U.S. at 74, 124 S.Ct. 1354.

Here, the rulings of the trial court violated Appellant's right to fully cross-examine and present his defense of the whole picture of the admittedly non-remembering Complainant to the jury, in this case that would only live or die on her testimony. The trial court understood this. The Court should deny the State's PDR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 27th day of October, 2017, a true and correct copy of the above and foregoing Appellant's Reply To State's Petition For Discretionary Review has been electronically sent to David M. Curl, Assistant Criminal District Attorney, at CCAappellatealerts@TarrantCountytx.gov, the State Prosecuting Attorney, Ms. Stacey M. Soule, at information@spa.texas.gov, and to Appellant by U. S. Mail.

/s/ Don Hase
DON HASE
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

In compliance with Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that the Appellant's Brief was prepared using Microsoft Word, and according to that program's word count function, the document contains 2386 words.

/s/ Don Hase
DON HASE
Attorney for Appellant